Supreme Court, U.S.
FILED

01 843 OCT 18 2001

OFFICE OF THE CLERK

In The

Supreme Court of the United States

ARMANDO CÓRDOBA and INDEPENDENT PARALEGAL SERVICES, INC.,

Petitioner,

vs.

LARRY G. MASSANARI,
Acting Commissioner of Social Security,

Respondent.

On Petition for a Writ of Certiorari to the United States *Court of Appeals for the Tenth Circuit*

PETITION FOR A WRIT OF CERTIORARI

DENNIS W. MONTOYA
LAW OFFICES OF DENNIS W. MONTOYA
P.O. Box 15235
Rio Rancho, NM 87174-0235
(505) 246-8499
(505) 246-8599 (Facsimile)
Attorney for Petitioner

99 pp

QUESTIONS PRESENTED

- Whether The Social Security Administration Is Required To Comply With The Rulemaking Provisions Of The Administrative Procedure Act In Issuing Substantive Rules Relating To The Fee Agreement Provisions Of The Social Security Act, 42 U.S.C. §406(A)(2)(A)?

- Whether There Is Federal Question Jurisdiction Pursuant To 28 U.S.C. § 1331, Under The Holding Of Shalala v. Illinois Council On Long Term Care, Inc. To Consider Petitioners' Constitutional Challenge To The Social Security Administration's Temporary Fee Agreement Instructions?

- Whether Complete Preclusion Of Important Claims Raised By The Petitioners Results If The Jurisdictional Preclusion Of 42 U.S.C. §405 (H) Is Applied?

- Whether There Is Federal Question Jurisdiction Pursuant To 28 U.S.C. §1331 Under Shalala v. Illinois Council On Long Term Care, Inc. To Consider Petitioners' Claim Of Invalid Rule-Making Under The Administrative Procedures Act?

PARTIES TO THE PROCEEDING

Independent Paralegal Services, Inc., has no parent company, and no publicly-held company holds 10% or more of its stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

PARTIES TO THE PROCEEDING iii

TABLE OF CONTENTS iv

TABLE OF CITATIONS vii

STATEMENT OF JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

A. THIS COURT SHOULD ACCEPT CERTIORARI IN THIS CASE TO CORRECT THE TRIAL COURT'S DISMISSAL, BASED ON LACK OF SUBJECT MATTER JURISDICTION, OF SIGNIFICANT EQUAL PROTECTION CLAIMS RAISED BY THE PETITIONER 5

B. THIS COURT SHOULD GRANT CERTIORARI TO CORRECT ERROR IN THE TRIAL COURT'S DISMISSAL, AND THE TENTH CIRCUIT COURT OF APPEALS' UPHOLDING OF THAT DISMISSAL, OF

SIGNIFICANT DUE PROCESS VIOLATION CLAIMS RAISED BY THE PETITIONER 9

C. THIS COURT SHOULD ACCEPT CERTIORARI TO DETERMINE WHETHER THERE IS FEDERAL QUESTION JURISDICTION PURSUANT TO 28 U.S.C. § 1331, UNDER THE HOLDING OF SHALALA v. ILLINOIS COUNCIL ON LONG TERM CARE, INC. TO CONSIDER PETITIONERS' CONSTITUTIONAL CHALLENGE TO THE SOCIAL SECURITY ADMINISTRATION'S TEMPORARY FEE AGREEMENT INSTRUCTIONS..... 10

D. THIS COURT SHOULD ACCEPT CERTIORARI BECAUSE AGENCY REVIEW IS A COMPLETELY INADEQUATE FORUM FOR MANY OF PETITIONER'S CLAIMS ... 11

E. THIS COURT SHOULD ACCEPT CERTIORARI BECAUSE COMPLETE PRECLUSION OF PETITIONERS' IMPORTANT CLAIMS RESULTS IF JURISDICTIONAL PRECLUSION UNDER 42 U.S.C. §405(h) IS APPLIED..... 14

F. THIS COURT SHOULD ACCEPT CERTIORARI TO REVIEW THE APPROPRIATE SCOPE OF RELIEF TO BE AFFORDED PETITIONERS UNDER PROVISIONS OF THE SOCIAL SECURITY

ADMINISTRATION'S RULES THAT THE LOWER COURT DEEMED INVALID 16

CONCLUSION 17

APPENDIX A: OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX B: MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO ENTERED 12/01/99

APPENDIX C: MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO ENTERED 07/30/99

APPENDIX D: MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO ENTERED 03/30/98

APPENDIX E: RELEVANT STATUTES

TABLE OF CITATIONS

Cases

Auster Oil & Gas Inc. v. Stream, 764 F.2d 381 (5th Cir.1985) 6

Ayala v. Joy Manufacturing Co., 877 F.2d 846 (10th Cir.1989) 5

Brown v. Zavaras, 63 F.3d 957 (10th Cir. 1995). 6, 7, 8

Califano v. Sanders, 430 U.S. 99, 97 S. Ct. 980 (1997)..... 11, 14

Franklin v. Meredith, 386 F.2d 958 (10th Cir. 1967) 5

Heno v. Sprint/United Management Co., 208 F.3d 847 (10th Cir. 2000) 16

Hishon v. King & Spalding, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) 7

Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, 927 F.2d 1111 (10th Cir.1991)..... 6

Jenkins v. McKeithen, 395 U.S. 411 (1969)..... 5

Maez v. Mountain States Tel. & Tel., 54 F.3d 1488, 1496 (10th Cir.1995) 5

Morgan v. City of Rawlins, 792 F.2d 975 (10th Cir.1986)..... 6

Shalala v. Illinois Council on Long Term Care, Inc., 120 S. Ct. 1084 (2000) 11

Sheridan Square Partnership v. U.S., 55 F.3d 1105 (10th Cir. 1995) 9

Weinberger v. Salfi, 422 U.S. 749 (1984) 15

Williams v. Meese, 926 F.2d 994 (10th Cir.1991)6

Wroblewski v. City of Washburn, 965 F.2d 452 (7th Cir.1992) 7

Statutes

28 U.S.C. §1254 1

28 U.S.C. §1331 ..... 10, 15

42 U.S.C §12112 ..... 2, 1, 3

42 U.S.C. §405(b) 15

42 U.S.C. §405(g) 10, 14

42 U.S.C. §405(h) 10, 11, 14, 15, 16

42 U.S.C. §406 ..... 3, 13, 14

42 U.S.C. §406(a)(3)(C) 13

Rules

Federal Rule of Civil Procedure 12(b)(6) 5, 6, 7

Regulations

20 C.F.R. §§404.903(f) and 416.1403(a)(6) 14

SSA's Hearings, Appeals and Litigation Law Manual 3, 4, 8, 9

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is set forth in Appendix A. The various decisions of the United States District Court for the District of New Mexico are set forth in Appendix B, Appendix C, and Appendix D.

STATEMENT OF JURISDICTION

On March 30, 1998, the United States District Court for the District of New Mexico dismissed most of Petitioner's claims, reserving jurisdiction only in mandamus to hear a portion of the issues raised by the Petitioner. On August 13, 2000, the United States District Court for the District of New Mexico granted summary judgment in favor of the Petitioner, but did so in a form that denied all meaningful relief. Petitioner appealed to the United States Court of Appeals for the Tenth Circuit. On July 20, 2001, the United States Court of Appeals for the Tenth Circuit affirmed the District Court's granting of summary judgment. This court has jurisdiction to review the case under 28 U.S.C. §1254.

STATUTES INVOLVED

The statutes involved in this case include 42 U.S.C. §405(g); 42 U.S.C. §405(h); 42 U.S.C. §406; and 42 U.S.C. §1981. Relevant portions of each of these statutes are set forth in Appendix E hereto.

STATEMENT OF THE CASE

Petitioners Armando Córdoba and Independent Paralegal Services, Inc. (hereinafter "Córdoba") filed a civil action in the United States District Court to secure injunctive and declaratory relief against the Commissioner of the Social Security Administration. (Hereinafter "SSA") Córdoba sought relief from the manner in which the Defendant administered the payment of representation fees to attorneys and representatives of successful disability claimants differently under the Social Security statute, regulations and policy. He also sought relief from certain Social Security Administration defective rule making relating to the requirements for approval of fee agreements, and further to have SSA's implementation of the fee agreement approval policy declared to be in violation of the Administrative Procedures Act.

SSA filed a Motion to Dismiss the case based on the Court's lack of subject matter jurisdiction. The District Court, in a Memorandum Opinion and Order filed on March

30,1998, held that it did not have §1331 jurisdiction to adjudicate the issue of SSA's differential treatment between attorney representatives and non-attorney representatives. The Court also found that it lacked mandamus jurisdiction to address whether the Commissioner correctly promulgated the SSA's fee regulations pursuant to 42 U.S.C. §406 The Court, however, found that it had mandamus jurisdiction to hear Córdoba's claim that the Defendants have promulgated the HALLEX (SSA's Hearings, Appeals and Litigation Law Manual), which sets out the requirements for the approval of fee agreements, without complying with the Administrative Procedures Act's rule making process.

During the entire course of the litigation below, SSA did not filed an Answer to the Complaint.

Subsequent to the District Court's first Memorandum Opinion and Order, Córdoba filed a Motion for Summary Judgment and SSA filed a cross-motion for Summary Judgment. Each of these motions was duly briefed, and responded to by the opposing party. The Court ruled on these motions in a single Memorandum Opinion issued on 1 December 1999. In this Memorandum Opinion and Order, the Court denied SSA's motion for summary judgment granted mandamus relief in favor of Córdoba on the grounds that SSA had failed to comply with the Administrative

Procedures Act in promulgating HALLEX. However, the Court denied Córdoba meaningful substantive relief, on the grounds that he had failed to demonstrate that he had exhausted SSA's alternative "fee petition" avenue in attempting to secure payment for representational services. Córdoba pointed out in a motion for reconsideration that he had, in fact, exhausted all such avenues prior to his initially filing suit. The Court's Memorandum Opinion and Order entered on March 3, 1998 (Exhibit D) acknowledged that administrative remedies had been exhausted. The Court still denied Córdoba relief, issuing on 1 December 1999 a Memorandum Opinion and Order denying a motion filed by SSA asking the Court to "Alter or Amend" its July 30, 1999, decision, while also denying Córdoba's request to be allowed to present evidence as to the fashioning of an appropriate equitable remedy under the Court's mandamus jurisdiction.

Córdoba timely appealed to the United States Court of Appeals for the Tenth Circuit. On July 20, 2001, the Tenth Circuit Court of Appeals affirmed the trial court.

This petition for a writ of certiorari to the 10th Circuit Court of Appeals follows.

REASONS FOR GRANTING THE WRIT

A. THIS COURT SHOULD ACCEPT CERTIORARI IN THIS CASE TO CORRECT THE TRIAL COURT'S DISMISSAL, BASED ON LACK OF SUBJECT MATTER JURISDICTION, OF SIGNIFICANT EQUAL PROTECTION CLAIMS RAISED BY THE PETITIONER

The trial Court dismissed, finding that it lacked jurisdiction, portions of Córdoba's Complaint for failure to state a claim for which relief could be granted, as contemplated by Federal Rule of Civil Procedure 12(b)(6). Dismissal of a complaint for failure to state a claim is highly disfavored. On the matter of dismissals pursuant to this rule, the United Tenth Circuit has held that "[t]he Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim." Maez v. Mountain States Tel. & Tel., 54 F.3d 1488, 1496 (10th Cir.1995) (quotations and citations omitted).

For purposes of such a motion, the material allegations in the complaint must be considered as true. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969), Franklin v. Meredith, 386 F.2d 958, 959 (10th Cir. 1967). The sufficiency of a complaint is a question of law which the Court of Appeals reviews de novo. Ayala v. Joy Manufacturing Co., 877 F.2d 846, 847 (10th Cir.1989) (*quoting*

Morgan v. City of Rawlins, 792 F.2d 975, 978 (10th Cir.1986)). ("We will uphold a dismissal [under Federal Rule of Civil Procedure 12(b)(6)] only when it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief.") Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, 927 F.2d 1111, 1115 (10th Cir.1991). ("In performing our review, we accept all well-pleaded allegations as true and construe them in the light most favorable to Petitioners.") Williams v. Meese, 926 F.2d 994, 997 (10th Cir.1991) (citation omitted). "We note that ' "[t]he Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure to state a claim."'" Morgan, 792 F.2d at 978 (*quoting* Auster Oil & Gas Inc. v. Stream, 764 F.2d 381 (5th Cir.1985)).

One of Córdoba's fundamental claims in this litigation has been that SSA denied him equal protection in the manner in which it struck down Independent Paralegal Services, Inc.'s, Fee Agreements with clients, while upholding virtually identical agreements by attorney representatives. It may be true, as SSA has argued below, that the Court addresses such a claim under the "rational basis standard", which imposes an extraordinarily difficult burden of proof on a Plaintiff. *See* Brown v. Zavaras, 63 F.3d 957, 971 (10th Cir. 1995). However, the issue now before the Court is NOT whether Córdoba's burden of proof would be difficult, but whether he should be granted the opportunity for full evidentiary development of

the case so that he might have an opportunity to meet that burden.

As the Tenth Circuit Court of Appeals noted in *Brown vs. Zavaras*, competing standards for resolving a plaintiff's equal protection claim under Federal Rule of Civil Procedure 12 complicate the Tenth Circuit's analysis when it reviews a plaintiff's claim under the rational basis standard. In Wroblewski v. City of Washburn, 965 F.2d 452 (7th Cir.1992), the Seventh Circuit identified and considered this issue:

> A perplexing situation is presented when the rational basis standard meets the standard applied to a dismissal under Fed R.Civ.P. 12(b)(6). The rational basis standard requires the government to win if any set of facts reasonably may be conceived to justify its classification; the Rule 12(b)(6) standard requires the plaintiff to prevail if "relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S.Ct. 2229, 2232-33, 81 L.Ed.2d 59 (1984). The rational basis standard, of course, cannot defeat the plaintiff's benefit of the broad Rule 12(b)(6) standard. The latter standard is procedural, and simply allows the plaintiff to progress

> beyond the pleadings and obtain discovery, while the rational basis standard is the substantive burden that the plaintiff will ultimately have to meet to prevail on an equal protection claim. Id. at 459-60. (Emphasis added)

The Tenth Circuit has adopted a hybrid approach to reconcile the standards, holding that a plaintiff pursuing an equal protection claim must allege facts sufficient to overcome a presumption of government rationality. Brown v. Zavaras, 63 F.3d at 971.

Córdoba has met and exceeded his burden, in that his Complaint alleges, *inter alia*, that SSA denied payment on Fee Agreements relying solely on HALLEX, an internal agency regulation manual that was adopted in violation of the APA. Mr. Córdoba has indeed gone further, prevailing under the Court's mandamus jurisdiction in establishing that the APA was, in fact, violated by SSA in its rulemaking, so that the issue is now *res judicata*. SSA cannot, therefore, establish any rational basis for denying Córdoba's Fee Agreements, apart from illegal action. Córdoba has overcome any presumption of government rationality and is therefore entitled to full relief, and his Equal Protection claims should never have been dismissed.

B. THIS COURT SHOULD GRANT CERTIORARI TO CORRECT ERROR IN THE TRIAL COURT'S DISMISSAL, AND THE TENTH CIRCUIT COURT OF APPEALS' UPHOLDING OF THAT DISMISSAL, OF SIGNIFICANT DUE PROCESS VIOLATION CLAIMS RAISED BY THE PETITIONER

The District Court applied similar reasoning and 42 U.S.C. §405 to dismiss Córdoba's Due Process claims, on the basis that the Court lacked jurisdiction. (Memorandum Opinion and Order of 30 March 1998) In the course of continued litigation under the Court's mandamus jurisdiction, however, Córdoba established that SSA relied solely on HALLEX, which was invalid rulemaking, in denying his Fee Agreements, which otherwise were fully acceptable under 42 U.S.C. §406.

Having met all criteria established by §406, Córdoba had a property interest in the fee provided by each fee agreement, so that the denial of that property interest violated Due Process. *See* Sheridan Square Partnership v. U.S., 55 F.3d 1105, 1109 (10th Cir. 1995). It is now *res judicata*, given the invalidity of HALLEX at the time SSA relied upon it to deny Córdoba's Fee Agreements, that his due process rights were violated. These claims should not have been dismissed by the trial Court. This case was decided by the District Court

without any type of hearing whatsoever. Justice was not served.

C. THIS COURT SHOULD ACCEPT CERTIORARI TO DETERMINE WHETHER THERE IS FEDERAL QUESTION JURISDICTION PURSUANT TO 28 U.S.C. § 1331, UNDER THE HOLDING OF SHALALA v. ILLINOIS COUNCIL ON LONG TERM CARE, INC. TO CONSIDER PETITIONERS' CONSTITUTIONAL CHALLENGE TO THE SOCIAL SECURITY ADMINISTRATION'S TEMPORARY FEE AGREEMENT INSTRUCTIONS

The application of the 42 U.S.C. §405 (h) limitation on jurisdiction results in a complete preclusion of judicial review of Petitioners' constitutional challenges to the Social Security Administration's temporary fee agreement instructions. For this reason, Section 405(h) precludes judicial review of the findings and decisions of the Commissioner of Social Security after a hearing except as provided under 42 U.S.C. §405(g). Section 405(g) provides that any individual, after any final decision of the Commissioner made after a hearing to which he was a party may obtain judicial review in federal district court. Thus, § 405(g) "clearly limits judicial review to a particular type of agency action, a 'final decision of the [Commissioner]

made after a hearing.'" Califano v. Sanders, 430 U.S. 99, 108, 97 S. Ct. 980, 985 (1997).

However, this bar is not absolute. The Court in Shalala v. Illinois Council on Long Term Care, Inc., 120 S. Ct. 1084 (2000) held that it would not apply §405(h) limitation on jurisdiction where application of §405(h) would not simply channel review through the agency, but would mean no review at all.

In the present case, Petitioners' case falls squarely within the exceptions to §405(h) that the Supreme Court identified in the *Illinois Council on Long Term Care* case in order for the jurisdictional preclusion of §405(h) not to apply.

D. THIS COURT SHOULD ACCEPT CERTIORARI BECAUSE AGENCY REVIEW IS A COMPLETELY INADEQUATE FORUM FOR MANY OF PETITIONER'S CLAIMS

The first requirement before the exceptions to 42 U.S.C. §405(h) apply is that the matter must have been presented to the agency prior to review in federal court. Mr. Córdoba and Independent Paralegal Services met this requirement. Petitioners, after being notified of the Commissioner's decision granting the claimants they represented disability benefits filed their fee agreement with the Commissioner. The fee agreements, which are the subject of this appeal, were then appealed to the chief administrative law

judge or the regional chief administrative law judge. Petitioners raised their statutory and constitutional claims in these appeals. The reviewing administrative law judge, upon completion of the review denied the fee agreements. The reviewing administrative law judge did not address these statutory and constitutional contentions. Córdoba and Independent Paralegal Services were then left with one other option. This option was the submission of a fee petition. They submitted their fee petitions in an attempt to get paid their representative fees owing after successful representation in the disability hearings. The Commissioner either denied the fee petitions outright or substantially reduced the amount that the Petitioners were requesting. In some cases the review administrative law judge granted as little as $10.00 per hour to the Petitioners for their work. Mr. Córdoba and Independent Paralegal Services have not only made their initial presentation to the agency but have also satisfied the channeling requirement under *Illinois Council on Long Term Care.* Id.

The "channeling" of all of Petitioners' legal contentions through the agency, however, did not assure the Commissioner any greater opportunity to apply, interpret or revise its policies or regulations. Nor did it allow the Commissioner to review Petitioners' constitutional issues. The fee petition procedure that was available to the Petitioners does not provide it with an adequate

forum to address its constitutional claims. The reviewing administrative law judge or other person reviewing the fee petition can only make amount determinations. 42 U.S.C. §406(a)(3)(A). Moreover, §406(a)(3)(C), moreover, provides that the reviewing administrative law judge or other person conducting the review shall affirm or modify the amount which would otherwise be the maximum fee. The fee petition appeal process in entirely limited to reviewing amount determinations, either by modifying or affirming initial amount determinations.

Furthermore, 42 U.S.C. §406 does not provide for an evidentiary hearing on any issue raised before the reviewing administrative law judge. Both §§406(a)(3)(A) and (a)(3)(C) provide persuasive evidence that Congress deliberately intended to limit reviews of representative fees to amount determinations. The very nature of the fee petition process operates as a practical equivalent of a bar to review of issues other than amount determinations. The lack of an evidentiary hearing, the limitations on the issue the reviewing administrative law judge can decide and the limitations on the authority given to the reviewing administrative law judge in deciding fee petitions appeals demonstrate that the fee petition process does not provide Mr. Córdoba and Independent Paralegal Services with an adequate avenue to agency review of their constitutional claims. Any efforts to raise constitutional claims in fee petition appeals would be futile and meaningless.

E. THIS COURT SHOULD ACCEPT CERTIORARI BECAUSE COMPLETE PRECLUSION OF PETITIONERS' IMPORTANT CLAIMS RESULTS IF JURISDICTIONAL PRECLUSION UNDER 42 U.S.C. §405(h) IS APPLIED

Compelling Petitioners to raise constitutional challenges through the fee petition process is not only equivalent to a complete denial of agency review, but rises to the level of a complete preclusion of judicial review. The relevant statute and corresponding federal regulation expressly provide that the decision of the Commissioner on fee petitions is not subject to judicial review. 42 U.S.C. §406(a)(3)(C); *see also* 20 C.F.R. §§404.903(f) and 416.1403(a)(6).

Petitioners have no other administrative procedure available to review the Commissioner's decision on their fee requests. The Commissioner's regulations do not provide for a hearing or other appeal on a petition for fees or fee agreements. Section 405(g) review is not available to Mr. Córdoba and Independent Paralegal Services. The decision on representative fees is made without a hearing, therefore is "not a final decision of the Commissioner made after a hearing" to which Petitioners were a party. Califano v. Sanders, 430 U.S. 99, 97 S. Ct. 980, 51 L.Ed. 2d 192 (1977), Siler v. Heckler, 578 F. Supp. 744 (N.D. Ga. 1983). In Copaken v.

Secretary of Health, Ed. and Welfare, 590 F.2d 729, 731 (8th Cir.1979), the court stated that it was "not persuaded that Congress intended to include attorneys [for purposes of this appeal, non-attorney representatives] when it provided either for hearings upon the request of 'any individual applying for a payment under this subchapter,' 42 U.S.C. §405(b), or for judicial review of a final decision when requested by a "party" to a hearing.'" (Brackets added). This becomes even more compelling in light of the Supreme Court's recognition in Weinberger v. Salfi, 422 U.S. 749 (1984), that constitutional questions are unsuited to resolution in administrative hearing procedures.

The application of 42 U.S.C. §405(h) would result in a complete preclusion of judicial review of Petitioners constitutional claims. Thus, under Shalala v. Illinois Council on Long Term Care, Inc. there is federal question jurisdiction pursuant to 28 U.S.C. §1331 to consider Mr. Cordoba and Independent Paralegal Service's constitutional claims.

F. THIS COURT SHOULD ACCEPT CERTIORARI TO REVIEW THE APPROPRIATE SCOPE OF RELIEF TO BE AFFORDED PETITIONERS UNDER PROVISIONS OF THE SOCIAL SECURITY ADMINISTRATION'S RULES THAT THE LOWER COURT DEEMED INVALID

The Complaint filed in this case charged violation of the Equal Protection Clause of the United States Constitution by the SSA in striking down Appellants' Fee Petitions. Judicial review of this claim was deemed precluded by the District Court, relying on 42 U.S.C. §405(h). Had the litigation been allowed to proceed, as it should have, Appellants would have been entitled to the full panoply of relief afforded for similar claims against other federal agencies. *See, e.g.,* Adarand Constructors, Inc. v. Slater (Non-minority subcontractor sued the United States Department of Transportation under the Equal Protection Clause).

At least one of the "Reconstruction Era" federal civil rights statutes, 42 U.S.C. §1981, is fairly invoked by the Appellants' Equal Protection claims. See, e.g., Heno v. Sprint/United Management Co., 208 F.3d 847 (10th Cir. 2000). Violations of civil rights, including Equal Protection, are remedied only through actual compensatory damages. Memphis Community

School District v. Stachura, 477 U.S. 299, 308, 106 S.Ct. 2537, 2543, 91 L.Ed.2d 249 (1986), *cited in* Cunico v. Pueblo School District No. 60, 917 F.2d 431, 444 (10th Cir. 1990). Appellants should therefore be allowed to maintain an action against SSA for their actual losses, which included the shutting down and complete loss of business of their offices in Tucson, Arizona and Oakland, California as a result of repeated denials of their Fee Agreements in denial of their Equal Protection rights.

CONCLUSION

For all of the foregoing reasons, this Court should grant certiorari to review the important issues of law presented herein.

Respectfully Submitted,

Dennis W. Montoya
MONTOYA LAW, INC.
Attorney for Petitioners
1905 Lomas Boulevard, NW
Albuquerque, NM 87104

(505) 246-8499
(505) 246-8599 (Facsimile)

APPENDIX

APPENDIX A: OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

United States Court of Appeals,
Tenth Circuit.

Armando A. CORDOBA; Independent Paralegal Service, Inc., doing business as Disability Advocacy Clinic, Plaintiffs-Appellants,

v.

Larry G. MASSANARI, [FN*] Acting Commissioner of the Social Security Administration, Defendant-Appellee.

FN* On March 29, 2001, Larry G. Massanari became the Acting Commissioner of Social Security. In accordance with Rule 43(c)(2) of the Federal Rules of Appellate Procedure, Mr. Massanari is substituted as the appellee in this action.

National Federation of Paralegal Associations, Amicus Curiae.

No. 99-2278.

July 20, 2001.

REAVLEY, Senior Circuit Judge.

Appellants Armando Cordoba and Independent Paralegal Services, Inc.

(collectively Cordoba) provide non-attorney representation to clients seeking social security benefits. The Social Security Act allows for such non-attorney representation. *See* 42 U.S.C. § 406. Cordoba brought this suit after the Social Security Administration (SSA) rejected numerous fee agreements he had submitted for approval, resulting in a loss of fees.

The statutory and regulatory scheme which governs the payment of fees to representatives of social security claimants draws certain distinctions between attorneys and non-attorneys. For example, the SSA is authorized to pay an attorney his fees directly from the past-due benefits due a claimant. *See* 42 U.S.C. § 406(a)(4)(A). An SSA regulation provides that the SSA will pay an attorney his authorized fee directly from past-due benefits, but that the SSA assumes no responsibility for the payment to a non-attorney of fees it has authorized. 20 C.F.R. § 404.1720(b)(4) (2000). [FN1]

> FN1. In addition, while attorneys in good standing may without further qualifications represent claimants, the Commissioner of Social Security prescribes qualifying rules for non-attorney representatives. 42 U.S.C. § 406(a)(1); 20 C.F.R. § 404.1705(b). Non-attorneys, unlike attorneys, must sign a

> written notice of appointment as a claimant's representative. *Id.* § 404.1707(b).

Cordoba alleged that the statutory and regulatory scheme unconstitutionally discriminates against non-attorneys, and that certain regulations had been promulgated in violation of the notice and comment rulemaking requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553. The district court considered challenges to four provisions of the SSA's "Hearings, Appeals and Litigation Law Manual" (known as HALLEX). The district court held, and the Commissioner of Social Security does not contest, that two provisions were "substantive" rather than "interpretive," and hence subject to the notice and comment provisions of the APA. *See id.* § 553(b)(3)(A) (providing that notice and comment requirements do not apply to "interpretative rules"); *Rocky Mountain Helicopters, Inc. v. FAA*, 971 F.2d 544, 546-47 (10th Cir.1992) (explaining that notice and comment rulemaking requirements apply to "substantive" rules but not to "interpretive" rules).

A. *Jurisdiction of Cordoba's Statutory Claims*

[1] As we understand Cordoba's appellate briefing, he complains that the district court erred in dismissing his substantive constitutional claims,

and in declining to grant certain requested equitable relief once it found a violation of the APA. [FN2] We discuss the equal protection claim below. On the claims other than the constitutional *1047 claims, we agree with the district court that the only jurisdiction it had was limited jurisdiction to issue mandamus relief. Although the case presents questions of federal law, the Social Security Act provides that "[n]o action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter." 42 U.S.C. § 405(h). Section 405(h) has been broadly interpreted to bar federal district court suits involving social security claims, where jurisdiction is allegedly based on general federal question jurisdiction. *See Weinberger v. Salfi*, 422 U.S. 749, 757-62, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975). Further, in *Califano v. Sanders*, 430 U.S. 99, 105-07, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977), the Court held that the APA does not provide an independent source of subject matter jurisdiction.

> FN2. The SSA argues that the "equitable" relief Cordoba seeks is in reality a claim for money damages from the SSA. The SSA contends that such a claim is barred by the APA, which only allows "relief other than money

damages," 5 U.S.C. § 702, and is also barred by the Social Security Act, which only allows for the direct payment of fees from the SSA to an attorney, *see* 42 U.S.C. § 406(a)(4)(A). We do not reach these arguments. We also note the SSA's contention that Cordoba has abandoned on appeal his argument below that the different treatment of attorneys and non-attorneys amounts to an equal protection violation. We conclude that Cordoba has preserved this argument on appeal.

We also agree with the district court that federal court jurisdiction under 42 U.S.C. § 405(g) does not extend to this case. Section 405(g), by its terms, would only apply if Cordoba were a "party" to a final agency decision of the Social Security Administration "made after a hearing." However, § 406(a) sets out the statutory procedures for non-attorney representatives, and § 406(a)(3)(C) states that fee determinations by the agency are final. Considering both § 405 and § 406, a claimant's representative should not be considered a "party" under section § 405(g). Further, Cordoba concedes in his supplemental brief that "[s]ection 405(g) review is not available to Mr. Cordoba and Independent Paralegal Services. The decision on representative fees is made without a hearing, [and] therefore is 'not a final decision of

the Commissioner made after a hearing' to which Appellants were a party."

[2] On the statutory claims, therefore, the only source of district court jurisdiction is the limited jurisdiction provided under the federal mandamus statute, 28 U.S.C. § 1361. We recognized such jurisdiction in *Ryan v. Shea*, 525 F.2d 268, 272 (10th Cir.1975). [FN3] Such mandamus jurisdiction exists "for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty." *Heckler v. Ringer*, 466 U.S. 602, 616, 104 S.Ct. 2013, 80 L.Ed.2d 622 (1984).

> FN3. While *Ryan* also recognized jurisdiction under the APA, a holding overruled by *Sanders*, 430 U.S. at 105-07, 97 S.Ct. 980, *Ryan's* holding that mandamus jurisdiction is available remains good law in this circuit.

[3] In ruling on the cross-motions for summary judgment, the district court properly refused to order the Social Security Administration to approve Cordoba's previously denied fee agreements or other requested injunctive relief, because Cordoba failed to offer proof that he had exhausted all other avenues of relief before the agency. In particular, the district court noted that, under 20 C.F.R. § 404.1725 (2000), the representative may file a fee

petition for a fee award after the Social Security Administration initially refuses to enforce a fee agreement. The court noted that Cordoba, in the cross-motions for summary judgment, did not show that he had pursued this administrative remedy. [FN4]

> FN4. After the court ruled on the cross-motions for summary judgment, Cordoba filed a motion for reconsideration. As the district court noted, Cordoba argued that he had submitted fee petitions which had been rejected, but also argued that pursuing the fee petition process would be inefficient, time-consuming, and costly, thereby apparently conceding that this process was still available to him. The district court noted that if Cordoba was saying that he had filed fee petitions, he should have presented that evidence before the court ruled on the summary judgment motions. Second, the court noted that Cordoba had still failed to show why, if he filed a fee petition now, the Commissioner would not be compelled to grant his fee petition in light of the court's ruling that certain provisions under which Cordoba's fee agreements had been rejected were invalid. We agree with the Commissioner's appellate brief that "now that the HALLEX provisions have been invalidated, the

> appropriate and available forum for plaintiffs to seek the relief to which they are entitled is through the normal administrative procedures provided by 20 C.F.R. part 404.1700." Hence, Cordoba again failed to show that he did not have an adequate alternative to mandamus relief. We see no error in the court's denial of the motion for reconsideration.

***1048** B. *Jurisdiction of Cordoba's Constitutional Claim*

[4] We are left with Cordoba's equal protection claim. As discussed above, the Social Security Act and regulations thereunder draw some distinctions between attorneys and non-attorneys. Over this constitutional claim, we are persuaded that the district court had general federal question jurisdiction under 28 U.S.C. § 1331.

Despite the language of § 405(h), discussed above, the Supreme Court has recognized that general federal question jurisdiction exists over certain constitutional claims relating to social security matters. Whether an exception to § 405(h) exists for colorable constitutional claims was discussed by the Supreme Court in *Califano v. Sanders*, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977), where the Court, in explaining prior case law, recognized the "well-established principle that

when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the extraordinary step of foreclosing jurisdiction unless Congress' intent to do so is manifested by clear and convincing evidence." *Id.* at 109, 97 S.Ct. 980 (internal quotation marks omitted).

More recently, in *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 120 S.Ct. 1084, 146 L.Ed.2d 1 (2000), the Court addressed whether a district court had federal question jurisdiction to hear a challenge to certain Medicare regulations. The regulations allegedly violated constitutional and statutory requirements. *Id.* at 7, 120 S.Ct. 1084. A provision of the Medicare Act incorporated § 405(h). The Court held that § 405(h) deprived the district court of federal question jurisdiction. *Illinois Council* interpreted *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 106 S.Ct. 2133, 90 L.Ed.2d 623 (1986), as holding that § 1331 federal question jurisdiction would exist if without it "application of § 405(h) would not simply channel review through the agency, but would mean no review at all." *Illinois Council*, 529 U.S. at 19, 120 S.Ct. 1084. *Michigan Academy*, however, only recognized a presumption of judicial review, which may be rebutted by "specific

congressional intent to preclude judicial review." 476 U.S. at 673, 106 S.Ct. 2133. In the pending case, § 406(a)(3)(C), discussed above, provides that review of a fee agreement by an administrative law judge "shall not be subject to further review," and arguably manifests congressional intent that there should be no judicial review of fee determinations.

After careful consideration, however, we are persuaded that the Social Security Act, and § 406(a)(3)(C) in particular, do not manifest "specific" congressional intent under *Illinois Council*, or "clear and convincing" evidence of congressional intent under *Sanders*, that a constitutional claim of the sort Cordoba raises should not be cognizable in federal court. Section 406(a)(3)(C) ***1049** concerns the procedures whereby an administrative law judge reviews the maximum fee allowed under the fee agreement procedure for obtaining fees. The fee agreement procedure is one of two procedures whereby fee can be recovered, the other being the fee petition procedure, *see* 42 U.S.C. § 406(a)(1); 20 C.F.R. § 404.1725 (2000). We do not read the procedures set out in § 406(a)(3)(C) as manifesting specific or clear and convincing congressional intent that Cordoba cannot challenge in federal court, on equal protection grounds, the regulatory scheme itself, rather than the fee awarded in a particular case

under the extant scheme. *See Buchanan v. Apfel*, 249 F.3d 485, 490 (6th Cir.2001) (distinguishing, for purposes of § 405(h), between "whether Congress intended to preclude review of challenges to the methods used in making those fee determinations, as opposed to precluding review of challenges to the individual fee determinations themselves."). Further, under *Illinois Council*, there is no apparent right under the regulatory scheme to challenge in an administrative proceeding the scheme itself on equal protection grounds, all the more reason to conclude that Congress did not intend to foreclose such a challenge in federal district court.

C. *The Equal Protection Claim*

[5] [6] [7] While the district court had general federal question jurisdiction to address the equal protection claim, judicial review of this claim, ultimately, is quite limited. The differing treatment of attorney and non-attorneys does not involve a suspect class and is subject to rational basis equal protection analysis. A statutory classification survives rational basis scrutiny "if here is any reasonably conceivable state of facts that could provide a rational basis for the classification," and under rational basis review, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation

unsupported by evidence or empirical data." *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993).

[8] The district court and the SSA have provided a number of grounds on which the Social Security Administration and Congress might rationally treat lawyers and non-lawyer representatives differently in the adjudication of social security claims. The district court noted that "there are a number of reasons why Congress and the SSA could conceivably have chosen to differentiate in this manner between attorney and non-attorney representatives. The direct payment method may provide an incentive for attorney representatives. The supervision of attorneys disciplinary panels provide may have reassured Congress with respect to possible abuses of the fee paying process." We also agree with the SSA that "Congress could have found that it could enlist an adequate number of non-attorney representative without resorting to the direct payment incentive it provided to attorneys." We are persuaded that the regulatory scheme passes rational basis equal protection scrutiny.

AFFIRMED.

END OF DOCUMENT

APPENDIX B: MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO ENTERED 12/01/99

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ARMANDO A. CORDOBA, INDEPENDENT PARALEGAL. SERVICES, INC., d/b/a DISABILITY ADVOCACY CLINIC,

Plaintiffs,

vs.

No. CIV 96-1393 MV/RLP

KENNETH S. APFEL, Commissioner of the Social Security Administration; SOCIAL SECURITY ADMINISTRATION UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Plaintiffs' Motion for Reconsideration [Doc. No. 47] and Defendants' Amended Motion to Alter or Amend Judgment [Doe. No. 46]. The Court, having considered the motions, responses, relevant law, and being otherwise fully informed, finds that neither motion is well-taken and both will be DENIED.

BACKGROUND

Plaintiffs Armando A. Córdoba and his firm Disability Advocacy Clinic ("DAC") brought an action against the Commissioner or Social Security and the Social Security Administration ("SSA") challenging denials of representation fees to representatives of successful disability claimants pursuant to the Hearings, Appeals and Litigation Law Manual ("HALLEX"). Plaintiffs alleged HALLEX had been promulgated in violation of the Administrative Procedures Act (''APA"), 5 U.S.C. §§ 552, 553.

On March 30,1998, this Court issued a Memorandum Opinion and Order dismissing for lack of subject matter jurisdiction Plaintiffs' claims concerning Defendants' differential treatment of attorney and non-attorney representatives and Defendants' promulgation of HALLEX as outside of its statutory authority. The Court found that it does have mandamus jurisdiction for Plaintiffs' remaining claim that certain provisions of HALLEX are void because the Defendants did not comply with the notice and comment provisions of the APA.

The parties subsequently fled cross motions for summary judgment. On July 30,1999, this Court granted summary judgment in part to each party. The Court found that two of the challenged

HALLEX provisions were interpretive rules consistent with the relevant statutory provisions and prior policy and therefore exempt from the APA notice and comment requirements. However, the other two provisions at issue were found to be substantive rules requiring compliance with the APA's notice and comment rulemaking. Because the Commissioner had not conducted notice and comment rulemaking, the substantive provisions were held invalid. Though, Plaintiffs sought to have the Court approve fee agreements that had been denied and order that the fees be paid, the Court held that mandamus relief was not appropriate because Plaintiffs had not shown that they had no other avenues for relief. See 28 U,S.C. §. 1361; Rosetti v. Shalala, 788 F.Supp.1380,1387 (E.D.Pa. 1992) (finding court lacked mandamus jurisdiction over claims for benefits where plaintiffs had failed to exhaust existing agency remedies).

Both parties now seek reconsideration of part of the Court's July 30,1999 Order. Plaintiffs urge the Court to reconsider its decision not to order Defendant to approve fee agreements previously denied and to pay fees due. Defendant moves the Court to reconsider its determination that two of the challenged HALLEX provisions are substantive rules that must be promulgated pursuant to the notice and comment procedures of the APA. 5 U.S.C. § 553.

Plaintiffs did not specify the particular rule of procedure pursuant to which they move for reconsideration. However, the Tenth Circuit has clearly stated that "regardless of how styled, a motion questioning the correctness of a judgment and timely made within ten days thereof will be treated under Rule 59(e)." Dalton v. First Interstate Bank, 863 F.2d 702! 703 (10th Cir.1988); see also Phelps v. Hamilton, 122 F.3d 1309,1323 (10th Cir.1997). Because Plaintiffs' motion was fled within ten days of the Judgment, Rule 59(e) controls.

ANALYSIS

A motion to alter or amend the judgment pursuant to Rule 59(e) should be granted only "to correct manifest errors of law or to present newly discovered evidence. "' Phelps, 122 F.3d at 1324 (quoting *Committee for the First Amendment v. Campbell*, 962 F.2d 1517,1523 (10th Cir.1992)). A motion to reconsider "is not a license for a losing party's attorney to get a `second bite at the apple"' to make legal arguments that could have been made previously. *Mantle Ranches, Inc. v. U.S. Park Service*, 950 F.Supp. 299, 300 (D.Colo.1997) (quoting *Johnston v. Cigna Corp.*, 7$9 F.Supp.1098,1101 (D.Colo.1992)). Both parties in this case seek exactly that - a "second bite at the apple." Rather than present newly discovered evidence, the parties make arguments that were or could have been made previously. Because these are

impermissible grounds for seeking reconsideration, the notions will be denied.

I. Plaintiff's Motion

Plaintiffs urge the Court to reconsider its decision not to order that Defendants pay previously denied fee agreements despite the Court's finding that mandamus relief was not appropriate because Plaintiffs had alternative remedies, including pursuing the fee petition process.

Plaintiffs' position is rather confusing. On the one hand, they aver that they do not have an adequate alternative remedy to mandamus relief and that they have filed fee petitions which have been denied. They then go on to argue that requiring Plaintiffs to pursue the fee petition process would be inefficient, timely, and costly, thereby conceding that this process is still available to them. Defendants assert, and Plaintiffs do not refute, that Plaintiffs could resubmit their fee agreements and that the Commissioner could not refuse them under the provisions invalidated by' the Court. Therefore, the Court finds that Plaintiffs do have an alternative remedy and the Court cannot grant mandamus relief. 28 U.S.C. §1361; *Rosetti*, 788 F.Supp. at 1386 ("The common law writ of mandamus, as codified in 28 U.S.C. § 1361, is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if

the defendant owes him a clear nondiscretionary duty.") (quoting *Heckler v. Ringer*, 466 U.S. 602, 616 (1984)).

The Court feels it important to point to a troubling issue - the extent to which Plaintiffs failed during the initial motions to address the availability of alternative remedies and continue not to discuss it fully. In their Motion for Reconsideration, Plaintiffs concede that "they did not address [in previous motions] the issue of whether there were alternative avenues of relief for approval of their agreements and payments of fees due." Plaintiffs' Motion for Reconsideration at 2. Arguing anew an issue already argued and resolved, with no new bases, is not an appropriate grounds for a Rule 59(e) motion. *All West Pet Supply v. Hill's Pet Products*, 847 F.Supp. 858, 860 (D. Kan. 1994) ("A motion to reconsider or to alter and amend may not be used as a vehicle for the losing party to rehash arguments previously considered and rejected by the district court.") (citations omitted). Further, Plaintiffs fail now in this motion to adequately substantiate the argument on which they seek reconsideration. Rather than presenting the Court with fully developed arguments and evidence in their Motion for Reconsideration, Plaintiffs ask the Court for the chance to brief the issues and present evidence in a hearing. Essentially then, Plaintiffs admit that they did not raise

an issue properly raised, and rather than now arguing it, Plaintiffs ask for the opportunity to argue it. This is counter to the vital goals of judicial economy and finality, and an improper basis for a Motion to Reconsider.

II. Defendants' Motion

While Plaintiffs raise an issue they should previously have argued more fully, Defendant reasserts the same arguments made in earlier motion on which the Court has already ruled. Defendant argues that HALLEX is an instructional manual which does not represent substantive rulemaking and, that the two provisions the Court found invalid, are reasonable interpretations of the relevant statute and regulations These exact arguments have already been made by Defendant. As stated above, it is improper in a motion to amend to "rehash arguments previously considered and rejected by the district court." *All West Pet Supply*, 847 F.Supp. at 860. Accordingly, Defendant's motion will be denied.

CONCLUSION

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Reconsideration [Doe. No. 47] and Defendants' Amended Motion to Alter or Amend Judgment [Doe. No. 46] are hereby DENIED.

MARTHA VÁZQUEZ
U. S. DISTRICT COURT JUDGE

APPENDIX C: MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO ENTERED 07/30/99

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ARMANDO A. CORDOBA, INDEPENDENT PARALEGAL SERVICES, INC., d/b/ a DISABILITY ADVOCACY CLINIC,

Plaintiffs,
vs.

No. CIV 96- 1393 MV/RLP

KENNETH S. APFEL, Commissioner of the Social Security ,Administration; SOCIAL SECURITY ADMINISTRATION; UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendants' Motion to Dismiss or for Summary Judgment [Doc. No. 31], and on Plaintiffs' Motion for Summary Judgment [Doc. No. 37]. The Court, having considered the motions, responses, reply, relevant law, and being otherwise fully informed, finds that Defendants' Motion is partially well taken and will be GRANTED in part and that Plaintiffs' Motion is partially well taken and will

be GRANTED in part. This decision resolves all remaining issues in the case.

PROCEDURAL BACKGROUND

Plaintiffs Armando A. Córdoba, and his firm, Disability Advocacy Clinic ("DAC") brought this action against the Commissioner of Social Security and the Social Security Administration ("SSA") asserting various claims relating to the Defendants' administration of payments of representation fees to representatives of successful disability claimants under the Social Security statute, regulations and policy. DAC employees represent claimants in applications under the Social Security Act for disability insurance and supplemental income payments.

Defendant filed a Motion to Dismiss the Complaint, and on March 30, 1998, this Court issued a Memorandum Opinion and Order dismissing for lack of subject matter jurisdiction Plaintiffs' claims concerning Defendants' differential treatment of attorney and non-attorney representatives and Defendants' promulgation of its Hearings, Appeals and Litigation Law Manual ("HA-LLEX") outside of their statutory authority. The Court found that it does have mandamus jurisdiction for Plaintiffs' remaining claim that certain provisions of HALLEX are void because the Defendants did not comply with the notice and comment provisions of the

Administrative Procedure Act ("APA"), 5 U.S.C. §§ 552, 553.

Having conducted discovery, the parties have now filed!-cross-motions. Defendants have moved to dismiss, arguing that the Court lacks mandamus jurisdiction over the remaining claim, or in the alternative, for summary judgment. Defendants' grounds for both motions are the same, namely that they did not have to comply with the APA because the HALLEX provision at issue is an interpretive rule exempt from the APA's notice and rule-making requirements, because the Commissioner's interpretation of the statute at issue is reasonable and because Plaintiffs have another avenue of relief. Plaintiffs have moved for summary judgment, arguing that the HALLEX provision at issue is a substantive rule requiring compliance with the APA and that the Commissioner's interpretation of the statute at issue is unreasonable.

Because the Defendants' bases for their alternative motions are the same, and because the Court will consider matters outside the pleadings in deciding this motion, the Court will treat Defendants' motion as one for summary judgment.

FACTUAL BACKGROUND

The Social Security Act authorizes the payment of fees to representatives of claimants seeking certain benefits under certain provisions of the Act. Prior to 1990, the relevant provision

concerning fee payments provided, in relevant part, that the Commissioner could prescribe rules and regulations governing the recognition of "agents and other persons, other than attorneys" as representatives and could set maximum fees that could be charged for representing claimants. 42 U.S.C. §406(a). The Commissioner promulgated regulations pursuant to this statutory authority, which state, in relevant part, that SSA will recognize a claimant's representative if both the representative and the claimant have signed a notice stating that the claimant wants the person to be his or her representative. 20 C.F.R. § 404.1707.

In 1990, Congress amended the Social Security Act, adding 42 U.S.C. §406(a)(2)(A). This section provides:

> In the case of a claim of entitlement to past-due benefits under this subchapter, if -
>
> (i) an agreement between the claimant and another person regarding any fee to be recovered by such person to compensate such person for services with respect to the claim is presented in writing to the Commissioner of Social Security prior to the time of the Commissioner's determination regarding the claim,
>
> (ii) the fee specified in the agreement does not exceed the

> lesser of [certain specified amounts], and
>
> (iii) the determination is favorable to the claimant,
>
> then the Commissioner of Social Security shall approve the agreement at the time of the favorable determination . . . .

The SSA has not promulgated rules in the Code of Federal Regulations that reflect this new statutory provision. Rather, on September 9, 1992, SSA issued HALLEX § 1-5-109. The parties do not dispute that the Commissioner has relied on the following portions of § 1-5-109 to deny fee agreements submitted by Plaintiffs:

1. The claimant appoints representatives who are not members of a single firm, partnership, or legal corporation. (Plaintiff's Undisputed Facts ¶18.)[1]
2. The claimant discharges a representative or a representative

---

[1] Since neither party has submitted a copy of HALLEX § I-5-109 with either set of motion papers, the Court relies on Plaintiffs' recitation of the relevant provisions of this Section along with Defendants' failure to dispute that the provisions claimed by Plaintiffs are in fact included in this Section.

withdraws from the case before SSA decided the case. (Id. ¶ 19.)

3. Both the claimant and the representative did not sign the fee agreement, (Id. ¶20.); and

4. The claimant employed more than one representative from a firm, partnership, or legal corporation and both representatives did not sign a single fee agreement. (Id. ¶21.)

While Plaintiff cites other portions of § I-5-109 in his Memorandum Brief in Support of His Motion for Summary Judgment, (Brief at 8-9), he does not claim denials of his fee agreements resulted from any of these other provisions.

Defendants explain, and Plaintiffs do not refute, that Plaintiffs' fee agreements have also been denied as a result of the Commissioner's policy allowing only the DAC employee who signs the fee agreement as representative, and not Mr. Cordoba or anyone else from his firm, to file the fee agreement for approval of payment. Mr. Cordoba signs the form as executive director of DAC; indicating that the agreement was accepted and approved" by DAC, while one or more DAC employees sign as the claimant's representative.

Defendants point out that when the Commissioner refuses to enforce a fee

agreement, the representative may file a petition for approval to collect fees. 20 C.F.R. § 404.1725. Plaintiffs do not dispute Defendants' claim that they have not pursued the fee petition process for fee awards in the cases where their fee agreement was rejected.

On their remaining claim, Plaintiffs seek an Order requiring Defendants to comply with the requirements of the APA, approve fee agreements submitted by Plaintiffs and pay the fees to which Plaintiffs are entitled.

STANDARD OF REVIEW

Summary judgment is an integral part of the Federal Rules of Civil Procedure, which are intended to "`secure the just, speedy and inexpensive determination of every action."' *Celotex*, 477 U.S. at 327 (quoting Fed.R.Civ.P.1). Under Rule 56(c), summary judgment is appropriate when the court, viewing the record in the light most favorable to the non-moving party, determines that "there is no genuine dispute over a material fact and the moving party is entitled to judgment as a matter of *law." Thrasher v. B&B Chemical Co., 2 F.3* d 995, 996 (10th Cir.1993).

The movant bears the initial burden of showing "there is an absence of evidence to support the nonmoving party's case." *Bacchus Indus., Inc. v. Arvin Indus., Inc., 939* F.2d 887, 891 (10th Cir. 1991). Once the movant meets

this burden, Rule 56(e) "requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the `depositions, answers to interrogatories, and admissions on file,' designate specific facts showing that there is a genuine issue for trial." *Celotex*, 477 U. S. at 324. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no `genuine issue for trial."' *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).*

Although the material submitted by the parties in support of and in opposition to the motion must be construed liberally in favor of the party opposing the motion, *Harsha v. United States, 590* F.2d 884, 887 (10th Cir.1979), the burden on the moving party may be discharged by demonstrating to the district court that there is an absence of evidence to support the nonmoving party's case. *Celotex*, 477 U.S. at 325. In such a situation, the moving party is entitled to judgment as a matter of law, "because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Id. at 322. ANALYSIS

"The common-law writ of mandamus, as codified in 28 U.S.C. § 1361, is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the

defendant owes him a clear nondiscretionary duty." *Heckler v. Ringer, 466 U.S. 602, 616 (1984).* Plaintiff argues that the four HALLS sections cited above as well as Defendants' policy of refusing to recognize DAC as a representative are void since the Commissioner failed to promulgate them pursuant to the notice and comment rulemaking requirements of the APA. Plaintiff argues further that the Commissioner's interpretation of the statute to exclude firms from being representatives cannot survive judicial scrutiny. The Court will address each allegation in turn.

I. DEFENDANTS' CLEAR, NON-DISCRETIONARY DUTY REGARDING HALLEX PROVISIONS.

A. Alleged Procedural Deficiencies.

APA § 552(a)(1)(D) requires that an agency publish in the Federal Register "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." Generally, before a rule is made effective, the agency must publish the proposed rule in the Federal Register, allowing appropriate time and opportunity for public comment. 5 U.S.C. § 553(b)-(d). However, these rules do not apply to "interpretive rules, general statements of policy, or

rules of agency organization, procedure, or practice." 5 U. S.C. § 553 (b)(3)(A).

As the Tenth Circuit has recognized, "[i]n practice, the courts have consistently required that agencies publish their rules and policy statements only if they constitute a change from the existing law, policy or practice." *Knutzen v. Eben Ezer Lutheran Housing Center*, 815 F.2d 1343,1351 (10th Cir.1987). Rules falling within the notice and comment rulemaking requirements of the APA are referred to as "substantive rules," while those falling outside of these requirements are referred to as "interpretive rules." *Rocky Mountain Helicopters, Inc. v. FAA, 971 F.2d 544, 546-47 (10th* Cir.1992). Thus, the notice and comment procedure of the APA is a nondiscretionary duty of the Defendants in connection with substantive rules, but not with respect to interpretive rules.

The Tenth Circuit has recognized that the determination of whether a particular rule is substantive or interpretive is difficult, *Rocky Mountain Helicopters*, 971 F.2d at 547 n.2, and has provided the following additional guidance: A rule is interpretive if it "attempts to clarify an existing rule but does not change existing law, policy or practice." *Id.* at 546-47. Moreover, an agency need not comply with the APA notice and comment rulemaking procedure in the face of clear statutory language authorizing the

agency's actions. *Dilley v. NTSB*, 49 F.3d 667, 670 (10th Cir.1995).

Reviewing the HALLEX provisions raised by Plaintiff in light of the Tenth Circuit analysis, the Court finds that the APA notice and comment rulemaking procedure does not apply to two of the four provisions at issue. The current regulations specifically require that both the representative and the claimant must sign the fee agreement. 20 C.F.R. § 404.1707. The HALLEX provisions that deny payment when both the claimant and the representative did not sign the fee agreement and when the claimant employed more than one representative and both representatives did not sign asingle fee agreement fall within this provision of the regulations. Neither of these provisions represents a change from the existing policy that requires that the claimant and the representatives) sign the same agreement. These two provisions are interpretive, and fall outside of § 553.

The same is true for the Commissioner's policy of refusing to recognize DAC or any other firm as a claimant's representative. There is no evidence in the record that this is a change in the Commissioner's policy concerning fee agreements. Neither side has pointed to a HALLEX provision stating this policy, and the Court notes that the original statutory provision, 42 U.S.C. § 406(a), as well as the implementing regulations for that

provision, 20 C.F.R. §§ 404.1707, 404.1720, all refer to the representative as a "person." As was the case in *Dilley,* the Commissioner is simply following the plain language of the statute and the regulations in denying DAC's attempts to have itself as a firm recognized as a representative. Without any evidence of a change in procedure, and in light of the plain language of the relevant statutory provisions, the Court finds that this policy is interpretive and does not require notice and comment rulemaking.

In contrast, the final two HALLEX provisions raised by Plaintiffs do not simply interpret or clarify the existing statutes or regulations. It appears from the provisions cited that the Commissioner will authorize a fee agreement signed by two representatives as long as they both sign on the same form as the claimant. However, the Commissioner will not authorize a fee agreement if those two representatives are not members of a single firm, partnership or legal corporation. The Court finds nothing in the statutory provisions or regulations that authorizes this exception. As the Ninth Circuit has recognized, a per se exception to the rights previously provided by statute or regulation is a change in existing law or policy and is therefore a substantive rule. *Linoz v. Heckler, 800* F.2d 871, 877 (9th Cir.1986); *see also United States v. Picciotto, 875* F.2d 345, 348 (D.C.

Cir.1989)("[A]n interpretive rule explains an existing requirement; it does not impose an `additional' one.").

The same is true for the HALLEX provision denying fee agreements when the claimant discharges a representative or a representative withdraws from the case before SSA decides the case. The statute provides that if a signed fee agreement is presented at the appropriate time and specifies a certain amount of fees, and if the determination is favorable, the Commissioner "shall approve the agreement." 42 U.S.C. § 406(a)(2)(A). The regulations clarify the requirements for the fee agreements, state the authority of the representative, explain notice provided to the representative and explain that the representative cannot charge more than the Commissioner authorizes. 20 C.F.R. § § 444.1707, 404.1710, 404.1715 and 404.1720. The Commissioner has carved out an exception for instances when the representative does not see the case through to completion. Pursuant to this provision, the commissioner denies a set of fee applications that would have been approved pursuant to the existing statute and regulations. Because these last two HALLEX provisions are substantive, the Commissioner had a clear non-discretionary duty to conform with the notice and comment procedure of § 552 and § 553 of the APA.[2]

---

[2] The Court recognizes that there might be a need for a policy to deal

B. Alleged Unreasonable Interpretation.

Plaintiffs claim that the Commissioner's policy of excluding firms as claimant representatives is contrary to the statute and regulations. Courts are highly deferential when reviewing an agency's interpretation of statutes and regulations which it must administer. *McNamar v. Apfel,172* F.3d 764 (loth Cir.1999); *Rocky Mountain Helicopters, 971* F.2d at 547. This is particularly so in cases involving the Social Security Act. *See Schweiker v. Gray Panthers,* 453 U.S. 34, 43 (198 1) (noting that Congress has given the Secretary exceptionally broad authority to prescribe standards for applying sections of the Social Security Act). The agency's interpretation is given "controlling weight unless it is arbitrary, capricious, or contrary to law." *McNamar,* 172 F.3d *at 766 (citing Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994)).*

Plaintiffs have not shown that the Commissioner's policy, which literally

---

with the circumstance where a claimant's representation ends prior to a determination. The Court has not considered the merits of the Commissioner's policy, but rather finds that this circumstance is not contemplated by either the statute or the regulations.

interprets the term "person" in the statute and regulations to mean just that, is in any way arbitrary, capricious or contrary to law. Plaintiffs have failed to point to any portion of the statute or the regulations that even remotely contemplates the participation of firms as claimant representatives. Since the Commissioner's interpretation is reasonable and consistent with the statute and regulations, it is entitled to deference. *See Ryder v. Shalala, 25 F.3d 944, 947 (10th Cir.1994).*[3]

II. OTHER AVENUES OF RELIEF.

Plaintiffs have requested three types of relief: compliance with the APA; approval of fee agreements submitted by Plaintiffs and payment of the fees to which Plaintiffs are

---

[3] The Court does not address the Commissioner's interpretation of any of the other HALLEX provisions at issue because Plaintiffs raise only their APA argument concerning these provisions. By failing to press these claims and failing to present any competent evidence in support of them in response to the motion for summary judgment, Plaintiffs have failed to carry their burden in opposing summary judgment on these grounds. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986).

entitled. On the first type of relief, the Court finds that Plaintiffs are not able to compel APA notice and comment in any way other than this suit. Defendants' failure to follow the notice and comment rulemaking requirements for the two HALLEX provisions found by the Court to be substantive rules means that those particular provisions are invalid and may not be applied by the Defendants unless and until they are promulgated pursuant to the APA procedures. *See, e.g., United States v. Picciotto, 875* F.2d 345, 346 (D.C. Cir. 1989) ("A rule which is subject to the APA's procedural requirements, but was adopted without them, is invalid."); *Linoz v. Heckler, 800* F.2d 871, 878 (9th Cir. 1986)("Agency rules are invalid if the agency fails to comply with APA requirements."). In light of the deference given to the Commissioner in interpreting the Social Security Act, and the fact that declaring these provisions invalid alleviates the harm caused to Plaintiffs, the Court finds that it is up to the Commissioner to decide whether to resurrect these now invalid provisions by following the APA procedures.

In contrast, Plaintiffs have failed to show that they have no other avenues of relief for their claims for approval of their agreements and payments of fees due. Plaintiffs failed to refute Defendants' claim that they have not pursued the fee petition process for fee awards in the cases where their fee

agreement was rejected. Nor have Plaintiffs argued that pursuing the fee petition process would be futile. Because Plaintiffs have other viable methods to seek approval of their fee agreements and payment of their fees, mandamus relief is contrary to the purpose of 28 U.S.C. § *1361*. *See Rosetti v. Sullivan, 788 F.* Supp.1380,1387 (E.D. Pa. 1992), *vacated on other grounds,Rossetti v.* Shalala, 12 F.3d 1216 (3d Cir. 1993) (Ending court lacked mandamus jurisdiction over claims for benefits where plaintiffs had failed to exhaust existing agency remedies).

CONCLUSION

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss or for Summary Judgment **[Doc. No. 31] is granted in part** and Plaintiff's Motion for Summary Judgment **[Doc. No. 37] is granted in part** as follows:

1. The HALLEX provisions requiring denial of claims when (1) the claimant appoints representatives who are not members of a single firm, partnership, or legal corporation; and (2) the claimant discharges a representative or a representative withdraws from the case before SSA decided the case, are invalid.
2. In all other respects, summary judgment is granted on all

remaining claims in favor of Defendants.

MARTHA VÁZQUEZ
U. S. DISTRICT COURT JUDGE

APPENDIX D: MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO ENTERED 03/30/98

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

ARMANDO A. CORDOBA, INDEPENDENT PARALEGAL SERVICES, INC., d/b/a DISABILITY ADVOCACY CLINIC,

Plaintiffs

vs. No. CIV 96-1393 MV/RLP

SHIRLEY S. CHATER, Commissioner Of the Social Security Administration; SOCIAL SECURITY ADMINISTRATION, UNITED STATES OF AMERICA,

Defendants.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendants' Motion to Dismiss, filed April 9, 1997 [Doc. No. 6]. The Court, having considered the pleadings, relevant law, and otherwise being fully informed, finds that the motion is well taken and will be granted in part and denied in part.

Background

Plaintiffs, a non-attorney representative of claimants for disability benefits and the corporation he controls, are aggrieved at the manner in which the social Security Administration ("SSA") administers the payment of representation fees to attorneys and representatives of successful disability claimants. Under section 206 of the Social Security Act, 42 U.S.C. §406, both attorneys and non-attorneys may represent claimants. 42 U.S.C. §406(a)(1) (1997). The statute and accompanying regulations treat non-attorneys differently in some ways, however. For instance, while attorneys in good standing may represent claimants as of right, non-attorneys first must follow qualifying rules and regulations prescribed by the Commissioner of Social Security. Id. Where non-attorneys must show a written notice of appointment from claimants, attorneys need not do so. 20 C.P.R.§ 404.1707 (1997). Where a prevailing claimant receives past-due benefits, SSA pays an attorney representative, who must instead look to the claimant for payment. 42 U.S.C.§ 406(b)(1)(A); 20 C.F.R.§ 404.1720. Lastly, Plaintiffs make the factual allegation that where SSA gives non-attorney representatives no such opportunity to respond knowingly and effectively to the claimants' arguments for fee reductions. Plaintiffs bring a constitutional challenge to this

different treatment under the statute, regulations, and SSA practice.

Plaintiffs also seek relief from certain SSA allegedly defective rulemaking. Their complaint state that SSA, contrary to the authority Congress has granted it under § 406, has implemented rules and regulations setting out requirements for approval of fee agreements. Plaintiffs allege that § 406 does not allow the promulgation of these requirements, but instead compels SSA to approve fee agreements and payments once statutory requirements are met, and that the Commissioner's authority is limited under § 406 to the recognition of representatives and the setting of maximum fees. According to Plaintiffs, in derogation of this constraint SSA has promulgated its Hearings, Appeals, and Litigation Law Manual ("HALLEX"), which goes beyond the statutory authority by setting out requirements for the approval of fee agreements. In essence, Plaintiffs claim that SSA has exceeded the scope of its payment regulation and approval authority under § 406.

Finally, Plaintiffs aver that SSA has not complied with Administrative Procedure Act, 5 U.S.C. § 553, by failing to publish and provide notice and comment of the allegedly substantive rulemaking the HALLEX embodies. Plaintiffs further state that SSA impermissibly changed the HALLEX rules Plaintiffs relied upon by denying payment of a fee agreement when Mr. Cordoba had his employees attend

hearings in his stead. Plaintiffs state that while the HALLEX allows this substitute representation, this change in the HALLEX allowable procedures came as a result of a memorandum issued by the Assistant Commissioner of SSA which SSA had not published. Because SSA must approve a fee agreement before a representative may charge the claimant a fee, 20 C.F.R. §404.1720, such denial allegedly deprives representatives of income. According to Plaintiffs, then, in promulgating both the HALLEX and the rule-changing memorandum SSA has failed to abide by the APA and has adversely affected their rights.

Plaintiffs claim having exhausted their remedies at the administrative level.

In their motion to dismiss Defendants raise jurisdictional grounds. First, Defendants assert that this Court cannot exercise federal question jurisdiction under 28 U.S.C. §1331, since section 205 of the Social Security Act, 42 U.S.C. § 405, expressly limits judicial reviews of SSA decisions.[4]

---

[4] The pertinent portions of the Social Security Act state:

(g) Judicial review

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of

such decision by a civil action commenced within sixty days after the mailing to hi of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, to the United States District Court for the District of Columbia…

(viii) Finality of Commissioner's Decision

The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decisions of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this chapter.

Defendants next argue that jurisdiction is unavailable either under the APA or the limited judicial review provision of §405(g). Moreover, Defendants also state that the Court is without mandamus jurisdiction under 28 U.S.C. §1361 because of the dual requirements that mandamus may lie only in exceptional circumstances and in light of clear illegality, neither of which is present here. As a corollary, Defendants maintain that the different treatment afforded to non-attorneys pursuant to statute and regulations does not amount to an equal protection violation. The Court addresses these jurisdictional arguments in turn.

Discussion

In considering its subject matter jurisdiction, the Court must first distinguish whether the challenge Defendants have brought is facial or factual. Mortensen v. First Federal Savings and Loan Ass'n, 549 F.2d 884, 891 (3rd Cir. 1977). In a facial attack, focusing on the sufficiency of the pleadings for jurisdictional consideration, courts must accept as true the facts plaintiffs have pled. Id.; 2 Moore's Federal Practice § 12.30(4) (1997). In a factual attack, a defendant questions the existence of subject matter jurisdiction in fact, irrespective of the pleadings. Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir. 1980), cert. denied, 449

---

42 U.S.C. §§ 405 (g) (h) (1997).

U.S. 953 (1980), citing Mortensen, 549 F.2d at 891. For all but the Court's mandamus jurisdiction, Defendants here have not addressed Plaintiffs' allegations, instead bringing a factual attack to the authority of this Court to hear this case. The Court is not bound, therefore, to accept all Plaintiffs' allegations. The Court will accept factual averments as true in its mandamus analysis, however, for there Defendants challenge the sufficiency of the facts to support such jurisdiction.

The First stop in the jurisdictional analysis, whether the Court can hear this case under its federal question jurisdiction, is a difficult one where the parties have eschewed their obligation to bring case law to the Court's attention. In the jurisdictional thicket of the interrelationship between 28 U.S.C. § 1331 and the Social Security Act, two lines of thought emerge. One, hazily delineated by the Supreme Court, would hold that this Court is without federal question jurisdiction to hear Social Security Act-based complaints. Weinberger v. Salfi 422 U.S. 749 (1975); Heckler v. Ringer, 466 U.S. 602 (1984); Califano v. Sanders, 430 U.S. 99 (1977). The other, put forth by the District of Columbia, the Fourth, and the Ninth Circuit Court of Appeals, sidesteps the conflict between the two statutes and distinguishes those Supreme Court decisions, reasoning that notwithstanding Social Security Act

limitations on § 1331 jurisdiction, in areas where actions are committed to absolute agency discretion by law, "courts have assumed the power to review allegations that an agency exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations." Guadamuz v. Bowen, 859 F2d 762, 767 (9th Cir. 1988).

Plaintiffs concede, without showing the alternate view to this Court, that under the statutory scheme of the Social Security Act, this Court is without federal question jurisdiction to review their claims. Although the Supreme Court has not always been crystal clear in discussing the federal question jurisdictional limitations of the Act,[5]

---

[5] For example, Mathews v. Eldrige, 424 U.S. 319 (1976) allowed judicial review of a constitutional due process claim arising from an agency decision where the constitutional challenge was entirely collateral to the substantive entitlement claim, id. at 330, while Weinberger, and Califano rejected the right to come to federal court for relief under § 1331, with the latter case reserving allowable subject matter jurisdiction to rare instances where the Commissioner's action is being challenged on constitutional grounds. Califano, 30 U.S. at 109. Moreover, more recently the Supreme Court has appeared to retreat from its decision in Weinberger, by holding in Bowen v. Michigan Academy of Family Physicians,

in a case involving in part substantive rights to disability payments under the Act, the Court held that 42 U.SA.C. § 405(h) closes the door on federal question jurisdiction, with the only avenue to federal courts being the SSA's review provisions at § 405(g). Weinberger, 422 U.S. at 761-63. That Plaintiffs here have alleged constitutional violations concomitant with their Social Security Act claims does not alter this determination. Id.; see also Heckler, 466 U.S. at 615; Califano, 430 U.S. at 109. The limitations of the Act apply "irrespective of whether resort to judicial processes is necessitated by discretionary decisions of the [Commissioner] or by [the] nondiscretionary application of allegedly unconstitutional statutory restrictions." Weinberger, 422 U.S. at 762. Weinberger, therefore, is clear that a court can not hear a substantive claim under its federal jurisdiction authority based even in part on the Social Security Act.

Two circumstances give pause in applying this analysis and holdings to Plaintiffs' case. The first is that Plaintiffs' claims for payment of fees are not for substantive disability

---

476 U.S. 667 (1986), that §405(h), as incorporated into Medicare legislation, did not preclude judicial review of substantial statutory and constitutional challenges. Id. at 680.

payments but are instead derivative of disability claimants' substantive rights. The Court recognizes, of course, that these claims for representation payment arise in part because the SSA provides the authority for non-attorney representatives to be remunerated for their representation of claimants.

Yet case law indicates that this distinction should not matter. Where attorneys were displeased with their fee awards for claimant representation, the Eighth Circuit Court of Appeals foreclosed the derivative action argument by affirming the trial court's dismissal for lack of subject matter jurisdiction. Copaken v. Secretary of Health, Education and Welfare, 590 F.2d 729, 731 (8th Cir. 1979). Implicit in Copaken, then, is that even Plaintiffs' derivative right can not help them evade the mandates of § 405(h). Nevertheless, Copaken does not discuss what other avenues for relief, if any, a representative aggrieved by an administrative decision may have available.

The second distinguishing feature between the case at bar and Weinberger and Califano is that both those cases had their roots in litigation involving the denial of substantive benefits for which the SSA does provide judicial review. Indeed, the availability of § 405(g) review may have been influential in the Supreme Court's reading of §405(h)'s limitations. Humana of South

Carolina, Inc. v. Califano, 590 F.2d 1070 (D.C. Cir. 1978)(citing cases). Here the complaint arises solely as a result of representation fee determinations, and §4065, read together with § 4305, sets out that representatives have no right to judicial review of the Commissioner's decision. See 42 U.S.C. § 406(a)(3)(C); Thomason v. Schweiker, 692 F.2d 333, 335 (4th Cir. 1982). This complete vesting of discretion in an administrative agency has caused some courts to find jurisdiction.

Humana, Thomason, and Guadamuz are three cases, which Defendants have not seen fit to mention to the Court, where appellate courts have ruled that in some instances § 405(h)'s -ban on federal question jurisdiction is not absolute. In Humana the central issue was whether the Secretary of Health, Education and Welfare had erred in calculating the return on equity capital to allow to Humana as a component of the reasonable cost of providing medical care. Humana, 590 F.2d at 1073. Before reaching the merits the appellate panel addressed the jurisdictional defenses the Secretary had raised. Id. at 1074. The court nodded to Weinberger, id., recognizing there the sweeping and direct preclusion of federal question jurisdiction that § 405(h) commanded. Id. Humana held that litigation questioning the constitutionality of statutory limitations on benefits, or statutory and constitutional assaults on

reimbursement amount restrictions all were within the scope of § 405(h). Id. at 1080. Nevertheless, the Humana court also held that a rulemaking challenge, solely alleging the failure to adhere to generally applicable rulemaking methodology, was outside that scope, and that "when suit is brought simply to vindicate an interest in procedural regularity, (42 U.S.C. § 405 (h) is not summoned into play." Id. Essentially, then, the Humana court found § 1331 jurisdiction to lie where the procedural mandates of the APA were allegedly not followed.

The Fourth Circuit in Thomason later also arrived at a result that appears to distinguish Weinberger. There attorney representatives had brought an action challenging a fee award for administrative representation. Thomason, 692 F.2d at 334. Recognizing that under §§ 405(g) and 405 (h) it was without jurisdiction to review the award, id., the court noted that "the setting of fees is committed to the [Commissioner's] discretion, and judicial review of the reasonableness of the fee is precluded." Id. at 335. The court then went on to say, however, that where a plaintiff would bring constitutional, statutory, or regulatory claims relating to fee awards, jurisdiction would exist, for "even where action is committed to absolute agency discretion by law, courts have assumed the power to review allegations that an agency exceeded its legal

authority, acted unconstitutionally, or failed to follow its own regulations." Id. at 336, quoting Garcia v. Neagle, 660 F.2d 983, 988 (4th Cir. 1981), cert. denied, 454 U.S. 1153 (1982). Thomason, therefore, is broader than Humana in carving out exceptions to § 405 (h)'s jurisdictional prohibitions. Where Humana found only procedural compliance with rulemaking to be an exception to § 405(h), Thomason would allow review of a wider range of claims.

Finally, the Ninth Circuit in Guadamuz, resting both on Thomason and Humana, also held that courts had jurisdiction to review, in the case where an action is committed to agency discretion by law, whether the agency has "exceeded its legal authority, acted unconstitutionally, or failed to follow its own regulations." Guadamuz, 859 F.2d at 767, citing Ness Inv. Corp. v. United States Dep't of Agriculture, Forest Service, 512 F.2d 706, 713-14 (9th Cir. 1975). The Guadamuz plaintiffs, attorney representatives, had sought a class action adjudication of their fee determinations under 42 U.S.C. § 406. Guadamuz, 859 F.2d at 763. Although the Guadamuz court heeded Weinberger when it ruled that it did not have jurisdiction to hear class members' claims, Guadamuz explained that it could entertain the named plaintiffs' lawsuit, apparently accepting their showing of exhaustion of administrative remedies as the equivalent of the final hearing requirement set out in § 405(g)'s grant

of jurisdiction. Id. at 767. The court seemed to find that attorney fee claims were procedural in nature, and thus not subject to the jurisdictional limitation of § 405 (h). Id., citing Humana, 590 F.2d 1070 n.77. What began as a narrow distinguishing of Weinberger in Humana, then, in Thomason and Guadamuz, has become a more extended exception to the jurisdictional mandates of 42 U.S.C. §§ 405 (g) and 405 (h).

The Tenth Circuit has skirted the issue of § 1331 jurisdiction in Ryan v. Shea, 525 F.2d 268 (10th Cir. 1975), decided after Weinberger but before Califano and Mathews. In Ryan the court considered whether the termination of benefits could only proceed after notice and hearing. Id. at 271. The Ryan court did not consider itself constrained by Weinberger's jurisdictional ruling because of Weinberger's being decided in the context of the refusal of a substantive benefits claim, as opposed to the procedural one facing the Ryan court. Id. 272. Without squarely addressing §1331 jurisdiction, Ryan found jurisdiction to lie either in mandamus or the Administrative Procedure Act, 5 U.S.C. §702. Id.

Twenty three years after Ryan and with the benefit of Califano and Heckler, this Court is not persuaded by those cases which, despite the broad language prohibiting § 1331 jurisdiction of Social Security Act claims,

adjudicated attorney fee disputes under an assumed jurisdictional power. See Guadamuz, 859 F.2d at 767. Moreover, representation fees for non-attorneys, like the benefits the Social Security Act grants and administers, are purely creatures of statute, thus counseling for the full applicability of Weinberger here. Lastly, Califano undercuts both Humana and Guadamuz, to the extent that the latter relies on a conclusion that attorney fee determinations are procedural. Califano makes following the result in Humana, the most thoroughly reasoned of the cases favoring § 1331 jurisdiction, now questionable by squarely holding that the APA is not an independent source of subject matter jurisdiction to adjudicate alleged violations of that statute.[6] Compare Califano, 430 U.S. at 105-107 with Humana, 590 F.2d at 1080-81. The Court finds, therefore, that it has no jurisdiction under § 1331 to adjudicate Plaintiffs' claims here.

---

[6] There is no room after Califano for arguing independent APA jurisdiction, and the APA can not serve to fill any interstitial jurisdictional gaps left by the SSA's limitation on federal question jurisdiction. Califano, 30 U.S. at 107. Despite their being claims in this litigation of non-compliance with the APA, it is settled law that the APAA is not "an implied grant of subject matter jurisdiction to review agency actions." Id. at 105.

Nor does the Social Security Act's judicial review provision itself grant the Court jurisdiction. Section 405(g) allows judicial review of Commissioner decisions only under limited circumstances. Under this section, the Court can review a decision only if the Commissioner rendered a decision after a hearing to which Plaintiffs were a party. 42 U.S.C. § 405(g). Although Plaintiffs state that they have exhausted their administrative remedies and that final agency action has occurred on all the issues raised in their complaint, Plaintiffs, here have not alleged that the Commissioner has rendered a decision on their procedural and fee disputes to which they were a party. Their complaint being deficient in a respect that is central to §405(g) jurisdiction, Weinberger, 422 U.S. at 764, the Court is without subject matter jurisdiction under §405(g)'s exceptions to 405(h)'s jurisdictional limitations. See also Califano, 430 U.S. at 108 (1977). Plaintiffs' recourse at this point, therefore, lies in the possibility of the Court's having mandamus jurisdiction to proceed.

Unlike the federal jurisdictional challenge to Plaintiffs' complaint, Defendants in arguing for lack of mandamus jurisdiction bring a facial challenge to the Court's power to hear this case. Whereas in arguing the Court's lack of jurisdiction under §1331, the Social Security Act, or the APA Defendants presented legal

arguments, here they do not assert that mandamus jurisdiction can not lie. Instead, Defendants contend that Plaintiffs have not brought forth sufficient factual allegations giving rise to the limited circumstances under which the Court can exercise its jurisdictional power under 28 U.S.C. §1361, the mandamus statute. Accordingly, for purposes of the mandamus jurisdictional issue the Court accepts all of Plaintiffs' averments of fact as true. Carpet, Linoleum & Resilient Tile Layers, Local Union No. 19, Broth. of Painters and Allied Trades, AFL-CIO v. Brown, 656 F.2d 564, 567 (10th Cir. 1981).

Despite this Court's being constrained in its jurisdictional reach, Plaintiffs are not left without the opportunity to voice their grievances in this forum, for the Court finds that it may hear some of their claims in mandamus. Without deciding the availability of mandamus jurisdiction in Social Security cases, the Supreme Court had underlined that "the common-law writ of mandamus, as codified in 28 U.S.C. §1361, is intended to provide a remedy for a plaintiff only if he has exhausted all other avenues of relief and only if the defendant owes him a clear nondiscretionary duty." Heckler, 466 U.S. at 616. Moreover, courts must be mindful in ascertaining the existence of mandamus jurisdiction that they

> cannot infringe on the decision-making left to the

> Executive Branch's prerogative. The "ministerial-discretionary dichotomy which permeates the jurisprudence of mandamus is merely shorthand for the well-taken rule that to the extent a statute vests discretion in a public official, his exercise of that discretion should not be controlled by the judiciary."

Marquez-Ramos v. Reno, 69 F.3d 477, 479 (10th Cir. 1995), quoting Carpet, Linoleum, 656 F.2d at 566.

In this case, Plaintiffs allege, and Defendants do not deny, that they have exhausted their administrative remedies. The single issue remaining in the determination of jurisdiction, therefore, is whether Defendants owe Plaintiffs a clear nondiscretionary duty.

Plaintiffs' Complaint presents several issues involving Defendants' duties. First, Plaintiffs argue that the different statutory and regulatory treatment of attorney and non-attorney representatives violate constitutional minimums of equal protection. Next, Plaintiffs claim that in not publishing HALLEX and in relying on an unpublished SSA memorandum to amend HALLEX, all without notice and comment, Defendants have acted contrary to their clear nondiscretionary duties under the APA. Plaintiffs also assert that SSA's denial

of their fee agreements is contrary to the clear mandates of § 406(a). Finally, Plaintiffs allege that by omitting to notify the of fee disputes, Defendants have failed in their clear duty under § 406(a)(3)(A) to involve them in the resolution of those disputes. Measuring the allegations in the complaint against the constitutional, statutory and regulatory framework, Marquez-Ramos, 69 F.3d at 479, the Court looks to each of these allegations to determine whether it may exercise mandamus jurisdiction.

It is hornbook law that the Constitution generally does not impose, for economic legislation, an equal protection duty beyond the legislature's having a conceivable rational basis for its actions. Lawrence H. Tribe, American Constitutional Law, § 16-3 (2d ed. 1988). This "near-absolute deference to legislative judgment," id. at 1445, applies in this case. Congress in enacting the SSA and providing funds for persons in need set two standards for authorizing representation of claimants. For instance, attorney representatives to a certain extent carry a lesser burden of showing their competence. See 42 U.S.C. § 406 (a)(1). Under agency regulations, attorneys also enjoy different treatment by receiving their fee directly from the agency when their client prevails in a disability claim, whereas Plaintiffs must look elsewhere, presumably to their clients, for payment. 20 C.F.R. § 04.1720.

Defendants suggest, and the Court agrees, that there are a number of reasons why Congress and the SSA could conceivably have chosen to differentiate in this manner between attorney and non-attorney representatives. The supervision of attorneys disciplinary panels provide may have reassured Congress with respect to possible abuses of the fee paying process. In any case, Plaintiffs have failed in their heavy burden of showing that the SSA or its accompanying regulations fail rational basis review. The lack of a constitutional duty of equal protection also shows the lack of mandamus jurisdiction to adjudicate this claim.

Next, the Court finds that it lacks mandamus jurisdiction to address whether the Commissioner correctly promulgated the SSA's fee regulations pursuant to 42 U.S.C. § 406. Section 406 states in pertinent part that the Commissioner "may prescribe rules and regulations governing the recognition of agents or other persons [and] … the maximum fees which may be charged for services in connection with any claim." 42 U.S.C. § 406(a)(1). Section 406 also states that if properly presented with a fee agreement in cases where a claimant prevails, the Commissioner shall approve the agreement. Id. § (a)(2)(A). Plaintiffs assert that in promulgating rules that set out the requirements for approval of fee agreements, Defendants have acted beyond the permissible scope of the statute, since § 406 mandates

approval of a fee agreement for a prevailing party. The Court rejects this argument, finding that it rests on too narrow and technical reading of § 406. Section 406 directs SSA both to set maximum fees and reasonable fees for attorneys. It also directs SSA to adjudicate fee disputes. The language of Section 406 therefore, is not simply ministerial but is permissive enough with respect to representation and fees that the Court can not say that, even taking Plaintiffs' allegations as true, Defendants have violated a clear nondiscretionary duty, particularly in light of their "exceptionally broad authority to prescribe standards for applying sections of the Act." Guadamuz, 859 F.2d at 768. The Court is without mandamus jurisdiction to hear this claim.

The Court has mandamus jurisdiction to hear the last of Plaintiffs' claims, however. Plaintiffs charge that Defendants have promulgated HALLEX, an allegedly substantive rulemaking, without notice and comment as set out in the APA. The APA directs that agencies generally provide notice and comment for rulemaking that does not involve "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice." 5 U.S.C. § 553(b)(3)(A) (1997). Accepting, for purposes of this inquiry, as true Plaintiffs' allegations that HALLEX is substantive in nature and is not an interpretive document, there is

not doubt that Defendants have a clear nondiscretionary duty under the APA to provide notice and comment. Lincoln v. Vigil, 508 U.S. 182, 195-96 (1993). In addition, Plaintiffs claim that the memorandum "repealing" the part of HALLEX which allowed substitute representation of a disability claimant is also a substantive rule. Again accepting this as true, the Court has mandamus jurisdiction to adjudicate this issue. Finally, Plaintiffs allege that Defendants did not provide them with notice of fee disputes, while providing this notice to attorneys as § 406 requires. A plain reading of § 406 shows that Defendants must provide notice of fee disputes regardless of whether the representative is an attorney.[7] There is no discretion to

---

[7] Section 406 is unequivocal:

> The Commissioner of Social Security shall provide by regulation for review of the amount which would otherwise be the maximum fee … if …
> (i) the claimant, or the administrative law judge or other adjudicator who made the favorable determination [of eligibility for benefits], submits a written request to the Commissioner of Social Security to reduce the maximum fee, or
> (ii) the person representing the claimant submits a written request to the Commissioner of Social

exercise with respect to this notice requirement; consequently the Court also has mandamus jurisdiction over this claim.

In sum, despite holding that federal question jurisdiction, as limited by the Social Security Act and its construing case law, is lacking the Court finds that it has mandamus jurisdiction to hear claims that Defendants have failed to provide certain procedural protections mandated by the Administrative Procedures Act. This result is in harmony with the Tenth Circuit pronouncement on the need for accountability in this "increasingly bureaucratic society." Carpet, Linoleum, 656 F.2d at 569, and leaves one door to the courts open, consistent with those cases which were reluctant to vest absolute, unchecked discretion in an administrative agency. See, Ryan, 525 F.2d at 272, Humana, 590 F.2d at

---

Security to increase the maximum fee.

Any such review shall be conducted after providing the claimant, the person representing the claimant, and the adjudicator with reasonable notice of such request and an opportunity to submit written information in favor of or in opposition to such request.

42 U.S.C. §406(a)(3)(A) (1997).

1080, Thomason, 692 F.2d at 336, Guadamuz, 859 F.2d at 767.

THEREFORE,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss, filed April 9, 1997 [Doc. No. 6] be, and it hereby is, granted in part and denied in part.

MARTHA VÁZQUEZ
UNITED STATES DISTRICT JUDGE

APPENDIX E: RELEVANT STATUTES

- **42 U.S.C. §405(g):**

(g) Judicial review

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of the Commissioner's answer the Commissioner of Social Security shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the

decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing. The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Commissioner of Social Security or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Commissioner of Social Security, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner's answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding; and the Commissioner of Social Security shall, after the case is remanded, and after hearing such

additional evidence if so ordered, modify or affirm the Commissioner's findings of fact or the Commissioner's decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which the Commissioner's action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.

- **42 U.S.C. §405(h):**

(h) Finality of Commissioner's decision

The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided.

No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter.

- **42 U.S.C. §406:**

§ 406. Representation of claimants before Commissioner of Social Security

(a) Recognition of representatives; fees for representation before Commissioner of Social Security

(1) The Commissioner of Social Security may prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys as hereinafter provided, representing claimants before the Commissioner of Social Security, and may require of such agents or other persons, before being recognized as representatives of claimants that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. An attorney in good standing who is admitted to practice before the highest court of the State, Territory, District, or insular

possession of his residence or before the Supreme Court of the United States or the inferior Federal courts, shall be entitled to represent claimants before the Commissioner of Social Security. The Commissioner of Social Security may, after due notice and opportunity for hearing, suspend or prohibit from further practice before the Commissioner any such person, agent, or attorney who refuses to comply with the Commissioner's rules and regulations or who violates any provision of this section for which a penalty is prescribed. The Commissioner of Social Security may, by rule and regulation, prescribe the maximum fees which may be charged for services performed in connection with any claim before the Commissioner of Social Security under this subchapter, and any agreement in violation of such rules and regulations shall be void. Except as provided in paragraph (2)(A), whenever the Commissioner of Social Security, in any claim before the Commissioner for benefits under this subchapter, makes a determination favorable to the claimant, the Commissioner shall, if the claimant was represented by an attorney in connection with such claim, fix (in accordance with the regulations prescribed pursuant to the preceding sentence) a reasonable fee to compensate such attorney

for the services performed by him in connection with such claim.

(2)(A) In the case of a claim of entitlement to past-due benefits under this subchapter, if--

(i) an agreement between the claimant and another person regarding any fee to be recovered by such person to compensate such person for services with respect to the claim is presented in writing to the Commissioner of Social Security prior to the time of the Commissioner's determination regarding the claim,

(ii) the fee specified in the agreement does not exceed the lesser of--

(I) 25 percent of the total amount of such past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title), or

(II) $4,000, and

(iii) the determination is favorable to the claimant, then the Commissioner of Social Security shall approve that agreement at the time of the favorable determination, and (subject to paragraph (3)) the fee specified in the agreement shall be the maximum fee. The Commissioner of Social Security may from

time to time increase the dollar amount under clause

(ii)(II) to the extent that the rate of increase in such amount, as determined over the period since January 1, 1991, does not at any time exceed the rate of increase in primary insurance amounts under section 415(i) of this title since such date. The Commissioner of Social Security shall publish any such increased amount in the Federal Register.

(B) For purposes of this subsection, the term "past-due benefits" excludes any benefits with respect to which payment has been continued pursuant to subsection (g) or (h) of section 423 of this title.

(C) In any case involving--

(i) an agreement described in subparagraph (A) with any person relating to both a claim of entitlement to past-due benefits under this subchapter and a claim of entitlement to past-due benefits under subchapter XVI of this chapter, and

(ii) a favorable determination made by the Commissioner of Social Security with respect to both such claims, the Commissioner of Social Security may approve such agreement only if the total fee or fees specified in such

agreement does not exceed, in the aggregate, the dollar amount in effect under subparagraph (A)(ii)(II).

(D) In the case of a claim with respect to which the Commissioner of Social

Security has approved an agreement pursuant to subparagraph (A), the Commissioner of Social Security shall provide the claimant and the person representing the claimant a written notice of--

(i) the dollar amount of the past-due benefits (as determined before any applicable reduction under section 1320a-6(a) of this title) and the dollar amount of the past-due benefits payable to the claimant,
(ii) the dollar amount of the maximum fee which may be charged or recovered as determined under this paragraph, and

(iii) a description of the procedures for review under paragraph (3).

(3)(A) The Commissioner of Social Security shall provide by regulation for review of the amount which would otherwise be the maximum fee as determined under paragraph (2) if, within 15 days after receipt of the notice provided pursuant to paragraph (2)(D)--

(i) the claimant, or the administrative law judge or other adjudicator who made the favorable determination, submits a written request to the Commissioner of Social Security to reduce the maximum fee, or

(ii) the person representing the claimant submits a written request to the Commissioner of Social Security to increase the maximum fee.

Any such review shall be conducted after providing the claimant, the person representing the claimant, and the adjudicator with reasonable notice of such request and an opportunity to submit written information in favor of or in opposition to such request. The adjudicator may request the Commissioner of Social Security to reduce the maximum fee only on the basis of evidence of the failure of the person representing the claimant to represent adequately the claimant's interest or on the basis of evidence that the fee is clearly excessive for services rendered.

(B)(i) In the case of a request for review under subparagraph (A) by the claimant or by the person representing the claimant, such review shall be conducted by the administrative law judge who made the favorable determination or, if the

Commissioner of Social Security determines that such administrative law judge is unavailable or if the determination was not made by an administrative law judge, such review shall be conducted by another person designated by the Commissioner of Social Security for such purpose.

(ii) In the case of a request by the adjudicator for review under subparagraph (A), the review shall be conducted by the Commissioner of Social Security or by an administrative law judge or other person (other than such adjudicator) who is designated by the Commissioner of Social Security.

(C) Upon completion of the review, the administrative law judge or other person conducting the review shall affirm or modify the amount which would otherwise be the maximum fee. Any such amount so affirmed or modified shall be considered the amount of the maximum fee which may be recovered under paragraph (2). The decision of the administrative law judge or other person conducting the review shall not be subject to further review.

- **42 U.S.C. §1981 (relevant part):**

Statement of equal rights

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.